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In The

Supreme Court of the United States

October Term, 1975

No. 75-270

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
and
NELLIE MAE WEBB, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

KENNETH B. HOLM
GERALD P. LAUGHLIN
MICHAEL G. LESSMANN
DAVID M. PEDERSEN
BAIRD, HOLM, MCEACHEN,
PEDERSEN, HAMANN & HAGGART
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500
Attorneys for Petitioners

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

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I. The Respondents err in asserting there is no conflict between the Eighth Circuit standard and Keyes v. School District No. 1, 413 U. S. 189 (1973).

The Respondents urge that the Eighth Circuit standard is consistent with this Court's reasoning in *Keyes*. In so concluding, they misconstrue both *Keyes* and the Eighth Circuit standard.

A. The Respondents' erroneous interpretation of Keyes.

The Respondent United States asserts that the Eighth Circuit standard is consistent with *Keyes* because this

Court recognized in *Keyes* that in certain circumstances fairness and policy require school districts to bear the burden of proof on intent where their actions have racial imbalance effects. Although this Court recognized that this burden shifting was not limited to former statutory dual systems, it explicitly limited its reasoning to school systems with a "history of segregation" and defined such systems as those where "a pattern of intentional segregation has been established in the past." 413 U. S. at 210. No such history of intentional segregation was initially established or proved in this case. Therefore, the Eighth Circuit's presumption cannot be supported by the same policy underlying *Keyes* and this citation to *Keyes* by the Respondent United States does not in any way dispel the conflict between the Eighth Circuit standard and *Keyes*.

B. The Respondents' erroneous interpretation of the Eighth Circuit's standard.

1. The Eighth Circuit standard is not simply a rule that allows intent to be inferred from effects.

Respondents Nellie Mae Webb, et al., argue that the Eighth Circuit standard is simply an application of the principle that persons may be presumed to intend the natural and probable consequences of their acts. The logic of the principle is apparent and it was explicitly recognized by the District Court in its analysis of the evidence (App. p. 43). However, this inference of intent from effects is merely permissible and not mandatory. *Sisco v. McNutt*, 209 F. 2d 550, 552 (8th Cir. 1954); *Cleo Syrup Corp. v. Coca Cola Co.*, 139 F. 2d 416, 419 (8th

Cir. 1943). The Eighth Circuit's presumption on the other hand, makes the inference mandatory and for that reason the logic of the presumption fails.

The fallacy is illustrated by the Eighth Circuit's holding of intentional segregation in new school construction. The purpose of the inquiry is to determine the School District's intent in constructing schools. The record as to most school construction reveals the following facts: (i) the population of Omaha was increasing; (ii) as the city expanded, new housing was being built on undeveloped land at the edge of the city; (iii) the new housing was populated predominantly by whites; (iv) the new concentration of population was without public educational facilities; (v) the School District had an obligation under state law to provide public education and facilities for that education; and (vi) the School District constructed new schools to serve these areas. Among the effects of the School District's action in building these schools were: (i) providing public educational facilities easily accessible to the new concentrations of population; (ii) providing such facilities in the most economical manner to preserve available tax revenues by utilizing available open land for construction; and (iii) opening new schools with predominantly white student bodies.

In its simplistic view of the manifold consequences of events, the Eighth Circuit's presumption selects only the racial balance effects of the School District's action in building a school as relevant for the inquiry as to intent and mandates the inference of segregative intent. If the purpose of the inquiry is to honestly and fairly attempt to determine the school authorities' actual intent as

to any particular action, it must be recognized that this inference of segregative intent is merely permissible and that competing inferences arise from other effects of that action. Can it not equally, or more persuasively, be inferred that in constructing new schools the School District intended to: (i) provide easily accessible public educational facilities where it found the population or (ii) provide new facilities for an expanding population as economically as possible. Certainly, as among the conflicting inferences, the one based upon segregative effects cannot in logic be treated as conclusive on the issue of intent merely because the Eighth Circuit labels it as "prima facie proof." *Wright v. Rockefeller*, 376 U. S. 52, 56-57 (1964).

The fallacy of the Eighth Circuit's presumption is further compounded upon its application to the entire record, which consists of hundreds of isolated actions, or decisions not to act, made by numerous employees of a corporate political body over a period of twenty years, causing multitudinous diverse effects. The Eighth Circuit's presumption is oblivious to the complex character of the actions it assesses. It is incapable of achieving a true understanding of the human reality presented by the record. Such a presumption only serves as a device to select out that part of the record showing a racial imbalance effect so that the remedial phase of the litigation may be expeditiously commenced.

2. The Eighth Circuit standard does not simply shift the burden of producing evidence.

The Respondent United States argues that the presumption employed by the Eighth Circuit does not con-

flict with Rule 301 of the Federal Rules of Evidence because the standard simply shifts the burden of producing evidence and not the burden of the risk of non-persuasion. Such an argument misconstrues the Eighth Circuit's decision. In each of five areas, the Eighth Circuit found that the Petitioners had not rebutted the presumption it developed. If the presumption merely shifted the burden of going forward with the evidence, then the Petitioners could fail to meet this burden only by not introducing any evidence as to their intent in adopting a particular policy or by introducing only evidence from which no reasonable person could infer that they acted without segregative intent.[1] The District Court's opinion on the merits reveals that the Petitioners not only introduced some evidence as to all actions in issue, but evidence from which a reasonable person could infer that those actions were taken without segregative intent. (See Pet. pp. 7-17.) Therefore, it is clear that the Eighth Circuit's standard did more than simply shift the burden of producing evidence, and consideration by this Court of the conflict between the standard and Rule 301 of the Federal Rules of Evidence is pertinent.

3. The Eighth Circuit standard cannot be rebutted in the same manner as the Sixth Circuit's standard in Oliver v. Michigan State Board of Education, 508 F. 2d 178 (6th Cir. 1974).

Both briefs in opposition have urged that the presumption employed by the Eighth Circuit may be rebutted

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1 McCormick, **The Law of Evidence** § 338, at 789-93 (2nd ed. 1972).

by showing that school district action or inaction "was a consistent and resolute application of racially neutral policies." Such a showing is that required by the Sixth Circuit in *Oliver v. Michigan State Board of Education*, 508 F. 2d 178 (6th Cir. 1974). The Eighth Circuit standard, however, requires something quite different in rebuttal in that the school authorities must establish that "segregative intent was not among the factors that motivated their action" (App. pp. 107-108). The Eighth Circuit explicitly adopted this quoted language from that part of this Court's opinion in *Keyes* in which the Court determined the proper burden to be imposed upon school authorities regarding additional portions of a school district once intentional segregation has been proved in a meaningful portion thereof. This Court specifically held that school authorities could not meet this burden by relying upon "some allegedly logical, racially neutral explanation for their actions." 413 U. S. at 210. Therefore, a racially neutral explanation for school district action or inaction will not serve to rebut the Eighth Circuit's presumption. Thus, Respondents' citation to *Oliver* is inapposite. The burden actually imposed by the Eighth Circuit is that detailed in the Petition (Pet. pp. 20-21). The Respondents apparently are unable to meet the argument there raised that the presumption actually employed by the Eighth Circuit is irrebutable and that, therefore, any requirement of proving segregative intent is eliminated.

4. The Eighth Circuit standard is not simply a consistent application of long-recognized principles governing the use of a prima facie

case in other decisions on racial discrimination.

The Respondents Nellie Mae Webb, et al., argue that the presumption employed by the Eighth Circuit is consistent with a long line of decisions by this Court recognizing the validity of using a presumption or *prima facie* case to shift the burden of proof in diverse areas of the law, including cases dealing with racial discrimination. In fact, however, the Eighth Circuit standard is a radical deviation from the Court's prior precedent because the standard's presumption is irrebutable.

The most recent racial discrimination case decided by this Court which these Respondents cite, *McDonnell Douglas Corp. v. Green,* 411 U. S. 792 (1973), illustrates the departure of the Eighth Circuit standard from sound legal principles. In *McDonnell,* this Court was not interpreting the Fourteenth Amendment, as the Court must here, but rather Title VII of the Civil Rights Act of 1964, which imposes non-discrimination obligations of broader scope than the Fourteenth Amendment. There, this Court held that once the plaintiff establishes a *prima facie* case of racial discrimination by proving that certain objective circumstances exist, the burden of producing evidence shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. This Court held that such an explanation suffices to discharge the employer's burden of proof. 411 U. S. at 802-803. Once the employer has introduced such evidence, the plaintiff must be given the opportunity to show that the employer's stated reason for rejecting him was a mere pretext.

The Eighth Circuit's standard is inconsistent with *McDonnell's* treatment of a *prima facie* case because the standard does not permit a legitimate, non-discriminatory reason for a school district policy to discharge the school district's burden of proof. Such anomalous treatment of defendants in school desegregation cases is unwarranted.

II. The Respondents err in asserting there is no conflict in the circuits on the proper standard for ascertaining segregative intent.

Both briefs in opposition fail to recognize the fundamental differences of approach taken by the various circuits on the proper standard for ascertaining segregative intent in the first instance. These cases may not be harmonized simply because most of them explicitly accept the principle that intent may be inferred from the effects of school authorities' actions. The cases differ: (i) on whether a presumption is to be used; (ii) on what sort of evidence, if any, serves to rebut the presumption; and (iii) on the weight to be given findings on intent by the district court.[2] This disparity of opinion on the proper standard has brought about opposite results in the face of similar facts in this case and *Higgins v. Board of Education of City of Grand Rapids,* 508 F. 2d 779 (6th Cir. 1974).

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2 In this regard, the Court should be apprised that the school district in **Morales v. Shannon,** 516 F. 2d 411 (5th Cir. 1975), cited in the Petition at page 24, has filed a Petition for Writ of Certiorari with this Court raising in part the same issues raised here. That petition (No. 75-598) was filed on October 21, 1975.

Respondents Nellie Mae Webb, et al., argue that there are significant differences between *Higgins* and this case (Res. Brief pp. 23-24). Each of the differences enumerated by these Respondents, except for the first one, is dependent upon a characterization of the evidence achieved by the respective court's view of the proper standard for determining segregative intent and cannot, therefore, be used to diminish the practical differences which result from employing different standards. As to the first alleged difference, a reading of *Higgins* reveals that these Respondents are mistaken in alleging that fewer student assignment practices were in question in *Higgins* than in this case. The facts in *Higgins* do not differ in kind from those before the Eighth Circuit here. Therefore, *Higgins* and this case are analogous on the facts but have disparate results because of the different legal standards applied and, thus, clearly illustrate the existing conflict in law among the circuits requiring resolution by this Court.

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CONCLUSION

For the above reasons, the Respondents have failed to refute the Petitioners' argument that the Eighth Circuit standard conflicts with this Court's reasoning in *Keyes* and that there is a conflict in the circuits on the proper standard for determining segregative intent in school desegregation cases. Therefore, for the reasons

stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

KENNETH B. HOLM
GERALD P. LAUGHLIN
MICHAEL G. LESSMANN
DAVID M. PEDERSEN
BAIRD, HOLM, MCEACHEN,
PEDERSEN, HAMANN & HAGGART
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Attorneys for Petitioners